IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, ex rel. W. A. DREW EDMONDSON, in his capacity as ATTORNEY GENERAL OF THE STATE OF OKLAHOMA and OKLAHOMA SECRETARY OF THE ENVIRONMENT C. MILES TOLBERT, in his capacity as the TRUSTEE FOR NATURAL RESOURCES FOR THE STATE OF OKLAHOMA,	)	
Plaintiff,	)	
vs.	)	
	)	**05-CV-0329 GKF-SAJ**
TYSON FOODS, INC., TYSON POULTRY, INC., TYSON CHICKEN, INC., COBB-VANTRESS, INC., AVIAGEN, INC., CAL-MAINE FOODS, INC., CAL-MAINE FARMS, INC., CARGILL, INC., CARGILL TURKEY PRODUCTION, LLC, GEORGE'S, INC., GEORGE'S FARMS, INC., PETERSON FARMS, INC., SIMMONS FOODS, INC., and WILLOW BROOK FOODS, INC.,	)	
Defendants.	)	

PETERSON FARMS, INC.'S REPLY IN FURTHER SUPPORT OF ITS MOTION FOR PROTECTIVE ORDER PROHIBITING FURTHER EX PARTE COMMUNICATIONS BETWEEN PLAINTIFFS' COUNSEL AND KERRY KINYON AND STRIKING PLAINTIFFS' REQUESTS FOR PRODUCTION OF DOCUMENTS

Defendant Peterson Farms, Inc., ("Peterson") hereby submits its Reply in further support of its Motion for Protective Order, (Docket No. 1310).

INTRODUCTION

It is unfortunate, but Plaintiffs' Response to Peterson's Motion for Protective Order illustrates why a Protective Order is absolutely required in the present case. Plaintiffs' counsel have attempted to justify their past and intended *ex parte* interactions with Kinyon by setting up an internal mechanism for receiving and evaluating the information provided by Kinyon, which they claim protects Peterson and complies with Oklahoma Rule of Professional Conduct 4.2.

The Plaintiffs' position cannot stand up to the slightest scrutiny. Plaintiffs righteously profess that they have stepped over no ethical lines because they directed Kinyon not to produce any protected information, but defend their conduct through a proud display of a scheme that they designed for that very purpose. Plaintiffs' scheme proves why an Order of protection is required:

(1) there is no dispute that Kinyon's actions reveal his desire to injure Peterson's interests;

(2) there is no dispute that Kinyon has been privy to Peterson's protectable information and communications;

(3) Plaintiffs' counsels' scheme reveals their recognition that their admonitions to Kinyon not to produce protected information are nothing more than unilateral prophylactic measures that are ineffective in preventing Kinyon's unilateral decision to make unauthorized disclosures of Peterson's privileged and trial preparation materials;

(4) Plaintiffs believe that under the Rules, they can receive Peterson's protected information, and using attorneys not involved in the case, who do not know the identities of all of Peterson's attorneys, representatives, confidential consultants, or the joint defense consultants, can make their own decision about what is, and is not protected information prior to turning the information over to their trial counsel; and

(5) Plaintiffs' counsel are quite comfortable ignoring Peterson's right to prevent the unauthorized disclosure of its protectable information through their compartmentalized view of the Rules of Professional Conduct, which wholly ignores the integrated relationship between the entire body and objectives of the Rules, as well as the stark appearance of their impropriety.

The question presented by Peterson's Motion for Protective Order is quite simple. The Kinyon situation presents a serious risk that Peterson's privileged communications, attorney work product, joint defense materials, and trial preparation materials will be disclosed without the authorization of the privilege holders. The solution, and apparently the only way to control this risk based upon Plaintiffs' Response, is an Order from the Court directing that the discovery of facts known by Kinyon be obtained through formal discovery processes that involve Peterson's counsel.

With regard to Plaintiffs' requests for production directed at Kinyon, Plaintiffs appear in their Response to be backtracking from the overly broad requests they propounded despite the fact that they refused to do so in the Rule 37 conference prior to Peterson's filing of the instant Motion. Plaintiffs' requests as written cast a very broad net over irrelevant and potentially sensitive personal information, which if not reigned in, will set a problematic precedent in this case as the discovery from former employees of Defendants and Plaintiffs proceeds.

ARGUMENT

A. Plaintiffs' Response Establishes the Need for a Protective Order

1. Plaintiffs' Scheme Demonstrates Plaintiffs' Belief that Kinyon Would in Fact Disclose Protected Information.

Plaintiffs devote much of their Response to describing their scheme that would provide for an internal review of the information disclosed by Kinyon prior to releasing it to their trial counsel. Plaintiffs' disclosure of this scheme begs the simplest of questions: <u>If there is not a real risk that Kinyon would disclose Peterson's protectable information, why would a "wall" and screening process be necessary?</u> The answer is equally simple. Plaintiffs do not dispute that Kinyon was within Peterson's management control group in this litigation, that he possesses both

confidential and proprietary information, as well as highly protected knowledge of attorney client communications, strategies, trial preparation materials, attorney work product, or that he was a party to protected joint defense information.[1] Plaintiffs also do not challenge that Kinyon's actions thus far demonstrate, whether rational or irrational, his desire to give Plaintiffs information he believes will injure Peterson in some way. Thus, the answer is that Plaintiffs set up the Bingham-Boudreau mechanism to deal with the confidential and protected information Kinyon was likely to give them.[2] If Plaintiffs' counsel's admonitions to Kinyon were truly effective, as Plaintiffs seem to profess, none of this would have been necessary. Likewise, if Plaintiffs' counsel had honored the objectives of the Oklahoma Rules of Professional Conduct and pursued their discovery in the light of day through a deposition and subpoena as Peterson repeatedly requested, neither the mechanism nor this Motion would have been necessary.[3]

2. Plaintiffs' Bingham-Boudreau Scheme Does Not Protect Peterson's Interests.

Plaintiffs' scheme demonstrates their recognition that their one-sided approach cannot guarantee that Kinyon will not unilaterally transmit or communicate Peterson's protected

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1 Plaintiffs make the argument that because Peterson trusted Kinyon with its privileged information when he was within the control group, it necessarily implies that Kinyon can discern what the law protects from disclosure. Besides being ludicrous, this argument misses the point that Kinyon does not have the authority to make such decisions.

2 Plaintiffs describe this process as prevent them from "receiving" privileged information. (Resp. at 2 and 8.) Clearly the process does not prevent "receiving" anything. Once Plaintiffs receive the information, Peterson's privileges are breached regardless of what Bingham and Boudreau choose to do with it.

3 Plaintiffs' Response devotes considerable space to contesting Peterson's contentions. Peterson drew its conclusions directly from the materials produced by Plaintiffs, including Mr. Riggs statement that Kinyon expressed a desire to be paid. To the extent Plaintiffs seek to spin Kinyon's communications differently, this reinforces Peterson's view that the Court should resolve this mess by erring on the side of protecting Peterson's interests.

information to them. There is only one way to guarantee that Peterson's privileges against disclosure are protected, and that is through the formal discovery process that allows Peterson's counsel to object to specific documents or inquiries, and if necessary, involve the Court.

Despite the obvious, Plaintiffs have determined for themselves that they are both entitled to and capable of deciding internally what of Peterson's information and documents disclosed by Kinyon their trial counsel are entitled to see. These are decisions that only Peterson and its counsel are authorized and qualified to make.[4]

Once Peterson's protected information reaches the hands of Attorney Bingham or Justice Boudreau, an impermissible, unauthorized disclosure has occurred, which Plaintiffs cannot cure through any internal review they construct. First, the authority to disclose the information resides solely with Peterson exercised through its counsel. *See Chandler v. Denton*, 741 P.2d 855, 865 (Okla. 1987) (stating, "[w]e begin with the fundamental premise that the attorney-client privilege is designed to shield the client's confidential disclosures and the attorney's advice. The privilege belongs to the client and not to the lawyer. It may be waived only by the client"). Second, only Peterson's counsel possess the information to know what is and is not protectable.

Plaintiffs' Bingham-Boudreau mechanism presumes that it will be apparent on the face of Kinyon's communication or the documents he discloses that they are subject to one of the privileges. This concept is fundamentally flawed. Plaintiffs' counsel know only the identities of Peterson's counsel who have entered appearances in this case. They are likely not aware of other

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4 Plaintiffs argue that simply because Kinyon offered to produce a "confidential envelope," it does not necessarily mean that it would contain privileged information is completely irrelevant. Plaintiffs are no more entitled to obtain *ex parte* access to Peterson's "confidential" information than they are its privileged information. Further, Plaintiffs are not entitled to wait and see what comes in to determine whether a privilege has been breached or not.

attorneys, legal staff and representatives who have played a role in Peterson's representation. Plaintiffs also lack the ability to distinguish facts known to Kinyon through his work experience, versus facts he has heard of that are known to or the opinions held by confidential investigators or consultants retained by Peterson's counsel in anticipation of or in preparation for trial. Further with regard to documents, unless they are emblazoned with a "Privileged" stamp, Plaintiffs have no sound basis for concluding whether they are protected or not.

Even assuming Plaintiffs can assume Peterson's counsels' role in screening Peterson's disclosures, Plaintiffs' approach naively ignores that protection from disclosure can arise in a number of scenarios. For example, communications between a defendant and another defendant's counsel or the counsel's investigator made in confidence to further a common interest in the defense are protected by the attorney-client privilege. *See United States v. McPartlin*, 595 F.2d 1321, 1335-1337 (7th Cir. 1979). A defendant's communications with its public relations consultants is protected by the attorney-client communication privilege. *E.g., In re Grand Jury Subpoenas Dated March 24, 2003,* 265 F. Supp. 2d 321 (S.D.N.Y. 2003). The attorney-client communication and work product doctrines can extend to communications between any persons and their counsel who share a common interest in litigation. *E.g., In re Grand Jury Subpoenas, 89-3 and 89-4, John Doe 89-129*, 902 F.2d 244, 249 (4th Cir. 1990). Thus, by virtue of the "common interest" doctrine, in order to discern what is and is not protected information, Bingham and Boudreau would have to be capable of identifying all of the parties to all of the communications and documents, know each person's role, and the purpose for which the document was created or the information communicated. This is clearly impossible.

3. Plaintiffs' Counsel Refuse to Conform Their Conduct to the Principles Underlying the Oklahoma Rules of Professional Conduct.

Peterson explained in its Motion that its concerns regarding Plaintiffs' counsels' conduct derives from not only the express provisions of Oklahoma Rules of Professional Conduct 4.2 and 4.4, but also the Preamble to the Rules, which compels every attorney practicing in this State to guide their conduct by the basic principles underlying the Rules. (Motion at 10.) Plaintiffs' Response reveals that rather than avoid the appearance of impropriety that has arisen from their *ex parte* communications with a former member of Peterson's control group, they are comfortable relying on selected holdings from cases that do not address the situation presented – where a formerly high-placed executive unilaterally comes forward seeking to disclose his employer's confidential information to opposing counsel.

The rational and proper approach was set forth by the court in *Dillon v. Sico Co.*, 1993 WL 492746 (E.D. Pa. 1993), discussed at greater length in Peterson's Motion to Compel. (Motion at 12.) In considering whether such *ex parte* communications are proper, the *Dillon* court focused on whether the threat of an unauthorized disclosure was real. Following the same analysis here leads to the inescapable conclusion that the risk that Kinyon will disclose protectable information is high based on his offer to do so, coupled with Plaintiffs' eagerness and mechanism created to handle the information when it comes in.

If the Court views the principles underlying Oklahoma Rule of Professional Conduct 4.2, it should appear clear that Plaintiffs' counsels' hands are not nearly clean. It should also be clear that Plaintiffs' counsels' conduct falls somewhere on the continuum between innocence and the egregious conduct that led to the disqualification of the plaintiffs' counsel in *Arnold v. Cargill*, 2004 WL 2203410 (D. Minn. 2004) (Motion at 13-15.) Granted, the plaintiffs' counsels'

conduct in *Cargill* appears more extreme than what has occurred here, which is why Peterson is not seeking the ultimate sanction. Nonetheless, Plaintiffs' counsels' conduct is of the very same vane as in *Cargill*, and given the risk that Peterson's protected information will be disclosed, it will likely lead to the same harm the *Cargill* court condemned. Plaintiffs lay down a weak excuse when they assert their conduct is not bad enough to disqualify them – that may be true, but it does not mean that their conduct is ethical, permissible or right.

4. Plaintiffs Have Not Shown That the Protective Order Will Cause Them Any Prejudice

Peterson is the only party with a risk of prejudice in the Kinyon situation. The record reflects that the risk is very real that Peterson's protectable documents and information may be disclosed at the hands of a former employee wishing the company harm. The harm from such an unauthorized disclosure could prove irreversible to Peterson's defense in this or other litigation. Plaintiffs have offered nothing to obviate that risk, and it is clear from their Response that only an Order of the Court directing them to refuse any *ex parte* communication with Kinyon is the only solution.

Plaintiffs, on the other hand, will lose nothing they are entitled to if the Court grants Peterson's Motion for Protective Order. Plaintiffs have already indicated that they intend to take Kinyon's deposition, so cost is not an issue. Plaintiffs have frequently issued document subpoenas out of the United States District Court for the Western District of Arkansas, so doing the same with Kinyon presents no additional burden. Plaintiffs can acquire all of the information the federal rules allow them through these two discovery devices. The only thing Plaintiffs will loose if the Court enters a Protective Order is the ability to obtain protected information through *ex parte* means.

B. Plaintiffs Have Not Shown Themselves Entitled to the Over Breadth of Irrelevant Documents Sought in Their Requests Nos. 22 and 23

In its meet and confer sessions with Plaintiffs' counsel in advance of the instant Motion for Protective Order, Peterson's counsel asked Plaintiffs' counsel to consider narrowing these requests to reach documents having some relevance or probative value in the lawsuit. They refused. Now in their Response, Plaintiffs seek to back-track and narrow their requests to documents Peterson may seek to use to impeach Kinyon at trial. It is improper for Plaintiffs to re-write their requests with some vague statements set forth in a response brief.[5] The issue before the Court is whether Peterson should be required to produce Kinyon's entire personnel file and all communications with Kinyon since his resignation. The idea of placing an executive's entire personnel file in the hands of Plaintiffs solely on speculation that there may be some document therein of impeachment value creates a steep slippery slope going forward in this litigation. Each of the Defendant corporations, and in fact the State of Oklahoma, have former employees possessing discoverable information. Shall the employment files of each of these former employees be placed at issue merely because they may be called to testify? Shall the privacy interests of these individuals be afforded such short shrift? Peterson suggests the answers to both questions is – no. By making an argument to support the discoverability of only a potential small fraction of the broad array of documents they requested, Plaintiffs' Response demonstrates that their requests are overly broad and subject to limitation.

Further, Plaintiffs' accusations that Peterson has acted "heavy handed" is uncalled for given the threat Plaintiffs' *ex parte* actions pose to Peterson's interests. As explained in

5 Plaintiffs state that they seek "*inter alia*, Mr. Kinyon's personnel file, including work evaluations…" "*Inter alia*," the legal equivalent to "yada yada" is where part of the problem lies.

Peterson's Motion for Protective Order and its response to the request, there is only one item of correspondence responsive to Request No. 22 that relates to this lawsuit, and it is the correspondence sent to Mr. Riggs, which was copied to Mr. Kinyon. If Plaintiffs believe Peterson's conduct has been improper in any way, they are free to explore it with Kinyon in his deposition.

CONCLUSION

Plaintiffs admit that they are inviting Kinyon to disclose information to which they would not otherwise be entitled. This conclusion is inescapable, otherwise, there would be no reason to set up a procedure to receive information from Kinyon, and screen it before it is passed on to Plaintiffs' trial counsel. Despite Plaintiffs' proclamations that they will properly care for Peterson's documents and information, and that they can be trusted to make correct decisions about what is or is not privileged, their entire approach to this matter smacks of impropriety. The rules of ethics demand a higher respect for Peterson's rights and its sole authority to decide when its protections from disclosure should be waived. Given Plaintiffs' refusal to employ only formal discovery from Kinyon that will allow Peterson's counsel to participate, the only way to protect against the risk that Kinyon will unilaterally disclose what he does not have the right to disclose is through an Order of the Court prohibiting further *ex parte* communications.

Finally, Plaintiffs' two requests for documents are facially over broad, and Plaintiffs have failed to set forth any basis for Peterson to produce the entire breadth of the documents described in Requests 22 and 23. Accordingly, Peterson requests the Court strike these requests and direct Plaintiffs to issue new requests properly tailored to reach relevant and probative materials as dictated by Fed. R. Civ. P. 26.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 3nd day of November, 2007, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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